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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/771,057	02/03/2004	Gregory E. Conner	21696/1211949-US2	1518
87155	7590	02/01/2010		
John Storella, P.C. 6451 Hillegass Avenue Oakland, CA 94618			EXAMINER ALSTRUM ACEVEDO, JAMES HENRY	
			ART UNIT	PAPER NUMBER
			1616	
			MAIL DATE	DELIVERY MODE
			02/01/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/771,057	Applicant(s) CONNER, GREGORY E.	
	Examiner JAMES H. ALSTRUM ACEVEDO	Art Unit 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 November 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 41-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 41 and 53 is/are rejected.
- 7) ☒ Claim(s) 42-46, 48-52 and 54-59 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Claims 41-59 are pending. Applicants previously cancelled claims 1-28. Applicants have newly cancelled claims 30-40. Claims 53-59 are new. Applicants amended claim set and remarks/arguments submitted on November 17, 2009 are acknowledged. All rejections not explicitly maintained in the instant office action have been withdrawn per Applicants' claim amendments.

Terminal Disclaimer(s)

The terminal disclaimer filed on November 17, 2009 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent No. 6,702,998 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Claim Rejections - 35 USC § 102

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 41, 47, and 53 are rejected under 35 U.S.C. 102(b) as being anticipated by the public use more than 1 year prior to Applicant's effective filing date by Mr. Bill Munro of an inhaler containing a 3% w/w hydrogen peroxide composition, as evidenced by (a) www.earthclinic.com/Remedies/hydrogen_peroxide_inhalation.html - accessed on January 29, 2010 ("Munro earth clinic"), (b) www.landrights.com/Hydrogen_Peroxide.htm - accessed on January 29, 2010 ("Munro land rights"), and (c) www.youtube.com/watch?v=aT1_Rkl0B1M - accessed on January 29, 2010 ("Munro instructional video").

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Applicant claims an inhaler containing a composition comprising hydrogen peroxide.

Mr. Bill Munro, who was born in 1924 (Munro earth clinic), states on his website that he has inhaled a 3% over-the-counter drug store composition of hydrogen peroxide, since about the age of 69 (i.e. since about 1993) [Munro earth clinic and Munro land rights]. The composition inhaled by Mr. Munro reads on a composition comprising (i) hydrogen peroxide and (ii) a pharmaceutically acceptable carrier. The inhaler used by Mr. Munro is depicted in cited references (a) and (b) and reference (c) is a video (Munro instructional video) of Mr. Munro instructing how to inhale hydrogen peroxide with the same inhaler he has used since about age 69. Thus, Mr. Munro's use entails the public use of an inhaler containing a composition comprising hydrogen peroxide and properly anticipates claims 41 and 53 of the instant application.

Double Patenting

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Applicant is advised that should claims 41-46 be found allowable, claims 53-58 will be objected to under 37 CFR 1.75 as being a substantial duplicate thereof. When two claims in an

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application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k). Claim 53 recites an inhaler that, when actuated, delivers hydrogen peroxide to a lung of a person, which is the same scope as claim 41, because the inhaler of claim 53 must contain a composition comprising hydrogen peroxide for it to deliver hydrogen peroxide upon actuation. Similarly, claims 54-58 are substantial duplicates of claims 42-46, respectively.

Allowable Subject Matter

Claims 42-46, 48-52, and 53-59 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. A search of the prior art has not uncovered an inhaler comprising a composition comprising hydrogen peroxide admixed with one of the following: (a) thiocyanate, (b) a peroxidase, (c) an antibiotic, (d) an antiviral or an antifungal, or (e) a sulfhydryl compound. The “inhaler” used in Mr. Bill Munro’s prior public use does not comprise a mouthpiece.

Conclusion

Claims 41, 47, and 53 are rejected. Claims 42-46, 48-52, and 53-59 are objected. No claims are allowed.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to James H. Alstrum-Acevedo whose telephone number is (571) 272-5548. The examiner can normally be reached on M-F, ~10:00-6:00 and Saturdays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on (571) 272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/James H Alstrum-Acevedo/
Patent Examiner, Art Unit 1616
Technology Center 1600

J.H. Alstrum-Acevedo, Ph.D.